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OLC RECORD COPY

MR

OLC 78-2002/16

27 September 1978

MEMORANDUM FOR: Deputy Director of Central Intelligence

FROM: Deputy Legislative Counsel

SUBJECT: "Third Agency Rule Issue in H.R. 12598, the 'Foreign Relations Authorization Act for Fiscal Year 1979' (also known as the 'State Department Authorization Act')"

1. Action Requested: None; this is to inform you that you may be receiving a call from Ben Read, Deputy Under Secretary for Management, Department of State, with regard to developments concerning the "Third Agency Rule" in subject bill and to provide you with helpful background.

2. Background: On 28 June 1978 the Senate passed subject bill. During the Senate floor action, Senator McGovern proposed a number of floor amendments including an unprinted one that would in effect require Federal agencies and departments with information within the jurisdiction of the Foreign Relations and International Relations Committees to provide that information regardless of the Third Agency Rule. Senator McGovern's amendment was adopted on the Senate floor but was subsequently stricken at conference; in its stead is the Conference Report language establishing a procedure for handling Third Agency Rule requests (Tab "A"). The Conference Report procedural substitute was accepted by the Administration in lieu of the proposed McGovern statutory change.

On 20 September, the Conference Report was submitted to the Senate by Senator Sparkman. Upon submission, Senator McGovern, as expected, made statements with regard to the Third Agency Rule aspects of the bill (attached and highlighted at Tab "B") that are not in accord with the appropriate Conference Report language.

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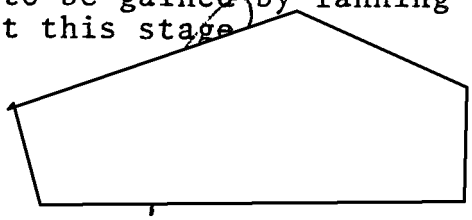
We have been informed that State Department is upset with the McGovern Congressional Record statement and may be calling to request that we join in such action.

3. Recommendation: That the Agency not get involved with raising the issue anew outside the context of an actual "case or controversy." McGovern's comments as recorded in the Congressional Record were totally expected; they represent his personal opinion with regard to the Third Agency Rule. We, of course, do not agree with his interpretation and expect to address the problems that may develop as they occur. Accordingly, no ground is to be gained by fanning the flames of this controversy anew at this stage.

STA



Attachments:
As stated

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95TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 95-1535

EXECUTIVE REGISTRY
FILE COPY

FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 1979

SEPTEMBER 6, 1978.—Ordered to be printed

Mr. FASCELL, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 12598]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 12598) to authorize appropriations for fiscal year 1979 for the Department of State, the International Communication Agency, and the Board for International Broadcasting, to make changes in the laws relating to those agencies, to make changes in the Foreign Service personnel system, to establish policies and responsibilities with respect to science, technology, and American diplomacy, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

SHORT TITLE

SECTION 1. This Act may be cited as the "Foreign Relations Authorization Act, Fiscal Year 1979".

TITLE I—DEPARTMENT OF STATE

AUTHORIZATION OF APPROPRIATIONS FOR FISCAL YEAR 1979

SEC. 101. (a) There are authorized to be appropriated for the Department of State for the fiscal year 1979 to carry out the authorities,

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nally appeared in the House bill. It has operative legal effect and its presence in this legislation must not be allowed to cause confusion either in the executive branch or in the Government of Panama.

The second provision of the conference report to which the legislative history must be clear is the amendment relating to the "third agency rule." As the joint statement of the managers notes, the amendment was dropped in conference only because it was deemed unnecessary—section 15(b) of the Basic Authority of the Department of State already requires so-called "third agency" information to be transmitted to the foreign affairs committees when a request is made under that section. The procedure described in the joint statement does not derogate from this requirement. It does not in any way imply a right to refuse to transmit "third-agency" information. Simply put, the law continues to require the department or agency to which the request is made to transmit the requested information regardless of the source of that information and regardless of whether that source may object.

Mr. President, I refer to a number of provisions in this conference report which strengthen the "Case Act," the law requiring the transmission to Congress of all international agreements. I believe that two items of correspondence will be of interest to the Senate in connection with these new amendments. The first is a response to a letter Senator Sparkman wrote to Secretary Vance recently asking that he set forth the criteria followed by the Department of State in determining whether a given arrangement constitutes an international agreement within the meaning of the Case Act. I ask that the response by the Chairman be entered at this point in the Record.

The material follows:

DEPARTMENT OF STATE,
Washington, D.C., June 23, 1978.

Hon. JOHN SPARKMAN,
Chairman, Committee on Foreign Relations, U.S. Senate.

DEAR MR. CHAIRMAN: The Secretary has asked me to reply to your letter of June 7 concerning the criteria applied by the Department of State in determining whether a given arrangement constitutes an international agreement within the meaning of the Case Act.

I have enclosed a copy of a statement issued in March, 1978 by the Legal Adviser to key personnel in the Department and sent to all diplomatic posts. This statement lists and discusses the several criteria applied by the Department in making determinations pursuant to the Case Act. In addition, I have enclosed a letter from the Acting Secretary of State in September, 1973, which is relevant to this problem.

Both of these documents were published by the Congressional Research Service of the Library of Congress in its study entitled "International Agreements: An Analysis of Executive Regulations and Practices" (Committee Print, 95th Congress, 1st Session, March, 1977, pp. 49–52), prepared for the use of the Senate Committee on Foreign Relations.

If you have further questions on this matter, you may wish to contact Mr. Arthur W. Rovine in the Office of the Legal Adviser, on 632–1074.

Sincerely,

DOUGLAS J. BENNET, Jr.,
Assistant Secretary for Congressional Relations.

Enclosures: 1. Criteria Statement, March, 1978. 2. Letter from Acting Secretary, September, 1973.

DEPARTMENT OF STATE

March 12, 1978

To Key Department Personnel
From L—Monroe Leigh
Subject: Case Act Procedures and Department of State Criteria for Deciding What Constitutes an International Agreement

On February 20, 1978, the Comptroller General issued a Report on U.S. Agreements with the Republic of Korea which stated that certain agencies of the Government have not been submitting to the State Department or the Congress all agency-level agreements which they have concluded. The Report states that some agencies have apparently interpreted agreements concluded by agency personnel or agreements of a subordinate or implementing character to be outside the reporting requirements of the Case Act (P.L. 92-403; 1 U.S.C. 112b). The Case Act requires that all international agreements other than treaties be submitted by the Department of State to the Congress no later than 60 days after their entry into force.

The GAO Report called for "clarification of the reporting requirements and improved controls over the reporting of agreements." The Report listed 34 Korean agreements concluded after passage of the Case Act but never submitted by the agencies involved to the Department of State for transmittal to the Congress.

This Report by the GAO, in addition to legislative proposals now before the Congress calling for Congressional authority to disapprove executive agreements, has raised the question of how the Department of State Legal Adviser decides what constitutes an international agreement within the meaning of the Case Act and of the law requiring publication of international agreements (1 U.S.C. 112a).

The following discussion should be brought immediately to the attention of all personnel with responsibilities for the negotiation and conclusion of international agreements, implementing or operating agreements, or government level agreements.

A. It is essential that all international agreements concluded by any officer or representative of the U.S. Government be transmitted to the Assistant Legal Adviser for Treaty Affairs no later than 20 days after entry into force. Most agreements enter into force upon signature. The 20-day limit must be met if the Department is to meet its obligations to process and transmit the agreements to Congress no later than 60 days after entry into force in accordance with the Case Act.

B. Whenever a question arises whether any document or set of documents, including an exchange of diplomatic notes or of correspondence, constitutes an international agreement within the meaning of the Case Act, the documents must be sent for decision to the Assistant Legal Adviser for Treaty Affairs. See also 11 FAM 723.6 and 723.7.

C. The following statement is designed to provide basic guidance with respect to the criteria applied by the Legal Adviser in deciding what constitutes an international agreement. While difficult judgments will have to be made in many cases, it is hoped that the principles set forth below will permit officers in the field to focus on the right questions, and to know when there is an issue for which further guidance from the Department should be sought.

For purposes of implementing legal requirements with respect to publication of international agreements and transmittal of international agreements to Congress, the Legal Adviser applies the following criteria in deciding what constitutes an international agreement:

1. Intention of the parties to be bound in international law;
2. Significance of the arrangement;
3. Requisite specificity, including objective criteria for determining enforceability;
4. The necessity for two or more parties to the arrangement;
5. Form.

1. Intention of the parties to be bound in international law.

The central requirement is that the parties intend their undertaking to be of legal, and not merely political or personal, effect. Documents intended to have political or moral weight, but not intended to be legally binding, are not international agreements. An example is the Final Act of the Helsinki Conference on Cooperation and Security in Europe.

In addition, the agreement must be governed by international law. Most instruments are silent as to governing law, but the intent is normally to seek guidance from rules of international law when questions arise with respect to interpretation or application. However, if the agreement specifies another legal system as entirely governing interpretation or application, we do not consider the arrangement to be a true international agreement. An example of the latter is a foreign military sales contract governed in its entirety by the law of the District of Columbia.

2. Significance of the arrangement.

It is our interpretation of sections 112a and 112b that minor or trivial undertakings, even if couched in legal language and form, do not constitute international agreements. Significance of the obligations undertaken is cited in the House Report on the Case Act (House Rept. 92-1301) as a relevant variable in deciding whether a particular document is an international agreement under the Act. Senator Case himself excluded "trivia" from the coverage of the Act (Hearings on S. 596, October 21, 1971, p. 65).

We have not developed detailed guidelines to assist in deciding what level of significance must be reached before a particular arrangement becomes an international agreement. This must remain a matter of judgment, taking into account the entire context of the particular transaction. It is frequently a matter of degree. For example, a promise to sell one map to a foreign nation is not an international agreement; a promise to sell one million maps probably is an international agreement. At what point between one and one million the transaction turned into an agreement is difficult to say.

The attached letter from Acting Secretary of State Kenneth Rush nn September, 1973, to all Government departments and agencies addresses itself to this problem. It requires agencies to transmit to the Department for possible transmittal to the Congress "any agreements of political significance, any that involve a substantial grant of funds, any involving loans by the United States or credits payable to the United States, any that constitute a commitment of funds that extends beyond a fiscal year or would be a basis for requesting new appropriations, and any of that involve continuing or substantial cooperation in the conduct of a particular program or activity, such as scientific, technical, or other cooperation, including the exchange or receipt of information and its treatment."

3. Requisite specificity, including objective criteria for determining enforceability.

International agreements require a certain precision and specificity setting forth the legally binding undertakings of the

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pore. The question is on agreeing to the conference report.

The report was agreed to.

Mr. ROBERT C. BYRD. Mr. President, I move to reconsider the vote by which the conference report was agreed to.

Mr. SPARKMAN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

FOREIGN RELATIONS AUTHORIZATIONS ACT, 1979—CONFERENCE REPORT

Mr. SPARKMAN. Mr. President, I submit a report of the committee of conference on H.R. 12598 and ask for its immediate consideration.

The ACTING PRESIDENT pro tempore. The report will be stated.

The legislative clerk read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 12598) to authorize appropriations for fiscal year 1979 for the Department of State, the International Communication Agency, and the Board for International Broadcasting, to make changes in the laws relating to those agencies, to make changes in the Foreign Service personnel system, to establish policies and responsibilities with respect to science, technology, and American diplomacy, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses this report, signed by all of the conferees.

The ACTING PRESIDENT pro tempore. Without objection, the Senate will proceed to the consideration of the conference report.

(The conference report is printed in the House proceedings of the RECORD of September 6, 1978.)

Mr. SPARKMAN. Mr. President, the conference report on H.R. 12598, the fiscal year 1979 International Security Assistance and Arms Export Control Authorization Act, provides a detailed explanation of the recommendations of the committee of conference. Because these recommendations closely parallel the legislation passed by the Senate, I will not take up the Senate's time with a detailed discussion of that bill.

The primary purpose of the legislation is to authorize fiscal year 1979 appropriations for the State Department, the International Communications Agency, and the Board for International Broadcasting. Concerning these budgetary amounts, I ask unanimous consent to have printed in the RECORD a table comparing the executive branch requests in the various authorization categories, the amounts approved by the House, the Senate amendments to those figures and the final conference agreement.

There being no objection, the table was ordered to be printed in the RECORD, as follows:

BUDGET ISSUES—FISCAL YEAR 1979

[In thousands of dollars]

	Executive branch request	House bill	Senate amendment	Conference
Department of State:				
Administration of foreign affairs	330, 143	348, 143	335, 143	348, 113
International organizations and conferences	412, 781	412, 781	450, 281	412, 825
International commissions	19, 973	20, 773	20, 773	20, 773
Migration and refugee assistance	56, 136	91, 336	115, 536	116, 536
Subtotal, Department of State	1, 319, 233	1, 374, 029	1, 422, 713	1, 399, 253
International Communication Agency	413, 327	417, 327	423, 577	420, 527
Board for International Broadcasting	85, 180	88, 180	88, 180	88, 180
Commission on Security and Cooperation in Europe	0	200	0	200
International Tin Agreement	60, 000	60, 000	60, 000	60, 000
Commission on Hunger and Malnutrition	0	0	1, 500	1, 500
Return of the "Guernica" to Spain	0	0	500	0
Total	1, 877, 740	1, 939, 736	1, 936, 470	1, 969, 710

Mr. SPARKMAN. The overall figure approved by the conference committee is slightly larger than that approved by the Senate. The increase is the result of additional costs caused by—

First, the need to strengthen visa processing in connection with the President's undocumented alien program;

Second, the funding of expenses involved with the U.N. Conference on Science and Technology;

Third, the need to strengthen the Department of State's ability to apply science and technology to foreign policy;

Fourth, increased rental acquisitions;

Fifth, increased language training;

Sixth, the need to strengthen the legal staffs of the Consular Bureau;

Seventh, the need to regulate the employment status of seasonal employees of the Passport Office; and

Eighth, the need to increase the annual authorization of the Commission on Security and Cooperation in Europe.

Concerning the nonbudgetary or policy amendments, a number of which were significant, I believe the conference was reasonably successful from the Senate perspective. Many of the provisions in the Senate-passed version have been retained with little or no revision. Included among those provisions are strong policy statements on:

First, the Cuban presence in Africa;

Second, atrocities in Cambodia and Uganda;

Third, the World Alternatice Energy Conference;

Fourth, prospective bilateral United States-Canadian negotiations on air quality standards;

Fifth, the establishment of a Commission on Hunger and Malnutrition;

Sixth, the negotiation of an international agreement with respect to the safe use of nuclear-powered satellites;

Seventh, the review of discriminatory trade practices;

Eighth, the establishment of an International Food Reserve;

Ninth, actions necessary to support international journalistic freedom; and

Tenth, actions needed to protect certain marine resources. Thus, in both its policy and budgetary provisions, H.R. 12598 contains a significant portion of the bill which passed the Senate.

Mr. President, I ask unanimous consent that a statement that has been prepared by Senator MCGOVERN be printed in the RECORD.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

STATEMENT BY SENATOR MCGOVERN

I believe that in the Committee of Conference on this bill a very fair compromise was achieved by the conferees. The Senate version of the bill contained a considerable number of amendments which had been added by the Foreign Relations Committee and by Floor action. Most of these provisions have been retained in the version agreed to by the Committee of Conference and I therefore find the conference report to represent a very satisfactory outcome from the Senate point of view.

I believe that the legislative history must be especially clear regarding two provisions of the conference report.

The first relates to implementation of the Panama Canal Treaties. The House version raised an extremely serious constitutional question. It prohibited implementation of the Panama Canal Treaties until such implementation was authorized by an act of Congress—in effect, nullifying the Senate's approval of those treaties and requiring their reapproval by both Houses of Congress.

I need not point out that that is not precisely the schemes contemplated by our Constitution. It has long been established that certain provisions of treaties may be self-executing—that is, they may become law of the land in the United States without the enactment of implementing legislation. While the Panama Canal Treaties contain a number of non-self-executing provisions—which will require the enactment of implementing legislation—the treaties also contain a number of self-executing provisions, such as those authorizing the transfer of property. But the House version, by refusing to recognize that fact, suggested that the Senate's approval of these treaties was somehow less than legally sufficient. It represented, in reality, an attempted incursion on the constitutional role of the Senate in the treaty-making process, and it was, thus firmly and unequivocally rejected by the Senate conferees.

As a result, the corresponding provision appearing in the conference report, although its language may appear similar, is in fact completely different. It does not require reapproval of the treaties by the Congress. Instead, it permits implementation of the treaties to the full extent provided for by the Constitution, which clearly authorizes the implementation of the self-executing provisions. The treaties, having been ratified, are the supreme law of the land. The President is authorized by the Constitution—indeed directed—to "take care that the laws be faithfully executed." Thus the President has full authority under the Constitution to plan and prepare for implementation of the Treaties prior to their entry into force.

In sum, as modified by the conference committee, the provision in question now bears

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CLARIFICATION OF INFORMATION REPORTING REQUIREMENT

The Senate amendment sought to clarify existing law which requires that "any Federal department, agency, or independent establishment shall furnish any information requested by either" the House International Relations Committee or the Senate Foreign Relations Committee "relating to any activity or responsibility" within the jurisdiction of these committees by adding, after "any information", the following: (notwithstanding the department, agency, or independent establishment of origin)." The amendment thus was intended to make clear that such requests cannot be refused simply because the information requested was originally derived from a different agency.

The House bill did not contain a comparable provision.

The conference substitute contains no provision on this issue. The committee of conference agreed that the amendment proposed by the Senate is unnecessary in view of the existing legal requirement that "any" information be furnished and that "any" information includes information derived from another agency. The committee of conference stresses that the so-called "third agency rule" may not, therefore, be used as an impediment to the timely furnishing of information requested by these congressional committees. The executive branch has assured the Congress that the rule will be used as intended and not as a tool to thwart intentionally congressional inquiry or otherwise delay such requests. Specifically, the committee of conference understands that, in the event any of the information requested from a particular department, agency or independent establishment was supplied by another such entity, the department, agency or independent establishment receiving the request shall (1) immediately inform the originating entity and request that entity's permission to release such information; and (2) immediately inform the requesting committee that the originating entity has been asked for permission to release such information to the requesting committee. If the originating entity denies permission to such department, agency or independent establishment, for the release of such items of information, the originating entity shall so inform the requesting committee, describing the items of information whose release has been denied.

The committee of conference intends that the procedure described above constitute the advice sought by Secretary of State Vance on August 2, 1978, regarding a means of resolving difficulties confronted by the foreign relations committees with respect to the "third agency rule."

U.N. CONFERENCE ON SCIENCE AND TECHNOLOGY

The House bill earmarked $945,000 for State Department expenses in conjunction with the U.N. Conference on Science and Technology for Development.

The Senate amendment contained findings on the importance of science and technology for development and expressed the sense of Congress that the United States should strongly support the purpose of the U.N. Conference and develop proposals for same. No funds were earmarked.

The conference substitute incorporates both the earmarking of $945,000 contained in the House provision and the findings and policy statement contained in the Senate amendment.

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